Knoxville Bar Association

Employment Law Update

September 13, 2012

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Supreme Court Update

2011-2012 Supreme Court Term

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Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 696 (U.S. 2012)

- S. Ct.'s seminal "ministerial exception" decision – courts cannot interfere in church's selection of ministers.
- Grounded in 1st Amendment's Freedom of Religion Clauses – applies to ministers and lay employees whose duties are "***primarily ministerial***."
- S. Ct. held plaintiff was ministerial employee: (1) she was ***held out as a minster*** by the church; (2) ***held herself out*** as such; (3) received ***significant religious training***; (4) charged with ***leading others toward Christian faith***.

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (cont.)

Some key points:

- The Establishment Clause prevents the government from appointing ministers; Free Exercise Clause prevents it from interfering with the freedom of religious groups to choose ministers.
  - Ministerial exception frees religious organizations from all employment discrimination laws, breach of contract suits, etc. with respect to ministers.
  - Sixth Circuit's three errors: (1) failed to see relevance of being a ***commissioned minister***; (2) gave ***too much weight*** to the fact that ***lay teachers performed the same duties*** as plaintiff; (3) ***too much emphasis*** on the ***time spent performing secular*** duties

Coleman v. Court of Appeals, 132 S. Ct. 1327 (U.S. 2012)

- Conservative majority (5-4) holds that Congress failed to abrogate State's sovereign immunity in "self-care" (a/k/a "medical leave") provision of FMLA. Distinguished *Hibbs v DHS.*
- To abrogate sovereign immunity Congress must:
  1) Do so in "unmistakably clear language;"
  2) Tailor the remedy to "***prevent or remedy***" conduct ***transgressing 14th Amendment's substantive provisions***;
  3) There must be ***congruence*** and ***proportionality*** between the ***injury*** and the ***remedy***;
- Here Congress was addressing "discrimination in illness, not sex;" – not substantive 14th A right.
- Any benefit to pregnant females is not "congruent and proportional" to remedy of universal medical leave.

Christopher v. SmithKline Beecham Corp., No. 11-204, 2012 U.S. LEXIS 4657 (June 18, 2012).

- Conservative majority (5-4) refuses to defer to DOL's interpretation of the "outside salesman" provision of FLSA.
- Holds pharmaceutical detailers (a/k/a "drug reps.") fall within statutory and regulatory definition of "outside salesman."
- DOL's position that they do not make "sales" because they do not "transfer title" not entitled to any defense.

Christopher v. SmithKline Beecham Corp., (cont.)

- DOL had obviously acquiesced in industry's practice until the current administration.
- Deferring to the DOL's interpretation would "seriously undermine the principle that ***agencies*** should ***provide*** regulated parties '***fair warning of the conduct [a regulation] prohibits or requires***.'" The Court held:

> "[I]t's one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to ***divine the agency's interpretations in advance*** or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference."

Arizona et al. v. United States, 132 S. Ct. 2492 (U.S. 2012)

- Supreme Court struck down employment-related aspect of Arizona's controversial immigration law.
- Arizona made it a criminal offense (misdemeanor) for "an unauthorized alien to knowingly apply for work … in Arizona."
- Held: The Immigration Reform and Control Act (IRCA) preempts Arizona law because the state law conflicts with the federal method of enforcement.
- State interfered with federal enforcement scheme which does not provide for criminal penalties to be placed on illegal workers.

2012-2013 Supreme Court Term

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Kloeckner v. Solis, 639 F. 3d 834 (8th Cir. 2011), *cert. granted by Kloeckner v. Solis, 132 S.Ct. 1088 (U.S. 2012*)

- Federal employees have two ***mutually exclusive*** options in "mixed" cases, i.e. when they are terminated for allegedly discriminatory reasons: (1) immediately appeal termination/discrimination to the MSPB; or (2) request a hearing before the EEOC.
- Plaintiff appealed termination to MSPB, then non-suited and requested EEOC hearing; EEOC dismissed without reaching merits; Secretary of Labor affirmed dismissal; ***re-filed appeal*** with MSPB which was ***held time-barred***. Plaintiff appealed to district court – not Federal Circuit.
- Eighth Circuit held: if MSPB decides discrimination on merits, Congress intended appeal to district court; if MSPB case dismissed on procedural grounds, Federal Circuit has exclusive jurisdiction.

Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. Tex. 2011), cert. granted by Fisher v. Univ. of Tex., 132 S.Ct. 1536 (U.S. 2012)

- Applicants sue University of Texas ("UT") under Equal Protection Clause of 14th Amendment challenging its use of ***race*** as ***one criteria*** in student admissions.
- Fifth Circuit affirmed summary judgment based on *Gruetter v. Bollinger*, 539 U.S. 306 (2003) (Equal Protection Clause did not prohibit the Michigan Law School's "narrowly tailored use of race in admissions decisions to further compelling interest in obtaining the educational benefit that flow from a diverse student body.")
- S. Ct. will determine if UT's use of race as one factor in a complex admissions system falls within *Gruetter*.

***Vance v. Ball State Univ.*, 646 F.3d 461 (7th Cir. Ind. 2011)**
cert. granted by *Vance v. Ball State Univ.*, 2012 U.S. Lexis 4685 (June 25, 2012)

- Seventh Circuit ***defines a supervisor*** for Title VII harassment purposes as an individual whose "authority primarily consists of the ***power to hire, fire, demote, promote, transfer or discipline*** an employee."
- Other circuits have held "authority to ***direct*** an employee's ***daily activities*** establishes supervisory status under Title VII."
- Seventh Circuit held that team leader who could "***tell plaintiff what to do***," but who had no other indicia of a supervisor, was a co-worker and not subject to *Faragher* and *Ellerth* analysis.

U.S. Airways, Inc. v. McCutchen 663 F.3d 671 (3rd Cir. 2011)

- Third Circuit holds ERISA authorizes courts to use equitable principles to rewrite clear plan language.
- Court refused to require participant to repay full plan benefits even where plan's terms give the absolute right to full reimbursement.
- Contrary to Fifth, Seventh, Eighth, Eleventh and D.C. Circuits.

Sixth Circuit Update

Disability Discrimination

Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012)

- Susan Lewis, often wheel-chair-bound RN, was discharged for profane outburst toward supervisor. Sued under ADA.
- Under *Monette*, Sixth Circuit has long applied "solely because of" disability standard of Rehab. Act.
- Lewis argued "motivating factor" test under Title VII applies. D. Ct. charged "solely because of" disability. Jury verdict for HAC.
- Sixth Circuit, sitting *en banc*, applied *Groce v. FLB:* (1) reversed *Monette; (2)* held "motivating factor" test inapplicable; (3) applied a "determining factor" test – a "but for" standard.

Melange v. City of Center Line, 2012 U.S. App. LEXIS 11175 (6th Cir. 2012)

- Melange suffered closed head and subsequent shoulder injury; exhausted available leave. Bargaining agreement required either return to work or be terminated.
- City asked Melange's physicians to report on whether he could return to work. ***First doctor said, "No***." City terminated him.
- ***Two weeks later***, second doctor said "***maybe***."
- Melange sued under ADA claiming a failure to reasonably accommodate and engage in interactive process.
- Sixth Circuit affirmed MSJ. "If employee never requests an accommodation, the employer's duty to engage in the interactive process is never triggered."

***Wurzel v. Whirlpool Corp.*, 2012 U.S. App. LEXIS 8640 (6th Cir. 2012)**

- Wurzel, a forklift operator, had a disease that caused ***heart spasms***, rendering him ***temporarily incapacitated;*** they ***occurred frequently*** and ***without warning***.

- Whirlpool sought medical guidance through an IME; examining M.D. found Wurzel was a "***direct threat***;" Wurzel had sandbagged his two treating doctors who disagreed with examining M.D. Whirlpool terminated – "direct threat."

Wurzel v. Whirlpool Corp., cont.

- Sixth Circuit affirmed MSJ.

  "Whirlpool's determination that Wurzel posed a direct threat was based on a ***reasonable medical judgment***, which relied on the ***most current medical knowledge*** and ***best available objective evidence*** and reflected an ***individualized assessment*** of Wurzel's abilities."

- Reasonable for Whirlpool to discount treating physicians' opinions because Wurzel had understated the severity/frequency of spasms.

Regan v. Faurecia Auto. Seating, Inc., 679 F.3d 475 (6th Cir. 2012)

- Regan's ADA action claimed FAS failed to reasonably accommodate her ***narcolepsy*** which was adversely impacted by ***new shift schedule***; asked to return to earlier arrival time to ***avoid driving in "heavier traffic***." FAS refused; Regan quit and sued.
- Sixth Circuit affirmed MSJ. Regan's request was not a reasonable accommodation required by ADA.
- "While an employer is required to provide reasonable accommodations that ***eliminate barriers in the work environment***, an employer is not required to ***eliminate those barriers*** which exist ***outside the work environment***."

Family and Medical Leave Act

Donald v. Sybra, Inc., 667 F.3d 757 (6th Cir. 2012)

- Donald was assistant manager at Arby's. She took FMLA leave for multiple surgeries in 2006 and 2007.
- In February 2008, Donald's supervisor discovered that she was ***stealing*** from cash register. Donald went out for three-day illness but did not request FMLA. Arby's terminated her for stealing immediately upon her return, which she denied.
- Donald brought FMLA ***interference*** and ***retaliation*** claims, among others.
- Sixth Circuit affirmed MSJ applying *McDonnell Douglas* to ***both*** FMLA ***interference*** and ***retaliation*** claims. Donald failed to prove that Arby's legitimate reason – stealing – was pretextual; court applied "***honest belief***" rule.

Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274 (6th Cir. 2012)

- Happy Oktoberfest – you're fired. Seeger, while on FMLA for herniated disc, declined limited light duty; co-workers reported seeing him at Oktoberfest walking/drinking beer; investigation ensued.
- HR Director terminated Seeger for "FMLA fraud" immediately upon his return to work. He sued for FMLA ***interference*** and ***retaliation***.
- Sixth Circuit affirmed MSJ. Seeger was given all of his leave negating his interference claim. *McDonnell Douglas* applied to retaliation claim
- *Temporal proximity alone* established *prima facie* case; however, Seeger was unable to overcome DBT's ***honest belief*** that he was guilty of FMLA fraud. Court held:

  "Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse that leave."

Thom v. Amer. Std., Inc., 666 F.3d 968 (6th Cir. 2012)

- Textbook case on how to ***mishandle*** FMLA leave and ***pay $300k***.
- Thom, a 36 year employee, was ***granted FMLA leave*** for surgery ***through 6/27***; ***released early*** for regular duty on 6/13; he could not return on 6/13 due to pain but submitted medical excuse on 6/17. ASI treated his 6/13-6/17 absences as ***unexcused*** and fired him.
- Thom sued for FMLA interference and retaliation; D. Ct. granted ***MSJ for plaintiff*** but denied liquidated damages.
- Sixth Circuit affirmed MSJ for plaintiff; reversed on liquidated damages. ASI's contention that it applied "rolling year method" to determine leave was ***pretextual*** where it had already granted leave beyond the end of rolling period, and never raised the defense until suit was filed.

Race and Sex Discrimination

Litton v. Talawanda Sch. Dist., 2012 U.S. App. LEXIS 13075 (6th Cir. 2012)

- Litton, custodian, transferred from high school to middle school; denied requests to return; told he ***did not "fit in***" at HS. No other change in employment conditions.
- Litton sued for race discrimination. Jury found: (1) ***no adverse employment action***; (2) but awarded $50,000 damages.
- Sixth Circuit held that D. Ct. was ***required to disregard*** the "no adverse action" finding - - elements of *prima facie* case are irrelevant once it is submitted to jury.
- Stinging dissent by J. Batchelder – adverse employment action may be part of *prima facie* case, BUT it is also an ***ultimate requirement*** for ***recovery***.

Wasek v. Arrow Energy Servs., 2012 U.S. App. LEXIS 12515 (6th Cir. 2012)

- ***Same-sex harassment case*** on oil rig with all male workforce. Wasek hazed by co-worker, sexual jokes, grabbing, etc. Told to "whip [co-worker's] ass," when he complained to management.
- Wasek walked off the job in frustration.
- Sixth Circuit held, to establish same sex harassment, plaintiff must prove: "(1) '***credible evidence*** that the harasser was ***homosexual***,' (2) evidence that 'make[s] it clear that the harasser is ***motivated by general hostility*** to the ***presence of [the same sex***] in the ***workplace***,' or (3) '***comparative evidence*** about how the alleged harasser treated members of both sexes in a ***mixed-sex workplace***'."
- MSJ against Wasek affirmed. Allegation that harasser "may have been homosexual" was insufficient.

Davis v. Omni-Care, Inc., 2012 U.S. App. LEXIS 11168 (6th Cir. 2012)

- Jose Davis complained of co-workers' ***noose*** made of ***string***; Area Director, Gloria Calhoun, investigated and ordered diversity training.
- Davis wanted co-worker terminated; he refused to respond to managers' calls; Calhoun called and he refused to talk to her; she fired him for insubordination.
- Davis' claim that his managers had retaliatory motive and Calhoun was "***cat's paw***" rejected; Calhoun's decision not tainted by input from allegedly retaliatory manager.
- Cat's paw declawed.

***Berryman v. SuperValu Holdings, Inc.*, 669 F.3d 714 (6th Cir. 2012)**

- Eleven African-American plaintiffs sued for racial harassment based on 25 years of scattered events (vulgar graffiti, racial comments, etc.)
- Sixth Circuit applied "***totality-of-the-circumstances***" test of *Jackson v. Quanex Corp.*
- Held: plaintiffs ***could not aggregate*** their claims because they failed to prove they were ***individually aware of*** the various ***public acts of harassment***.
- When asked individually in depositions to list all acts they were aware of, EEs did not testify about "public" acts or acts directed at others.

Romans v. Mich. Dep't of Human Servs., 668 F.3d 826 (6th Cir. 2012)

- Romans, white, and Perteet, black, swapped allegations of racial harassment.
- Initial investigation by Hall-Thiam found Romans' harassment of Perteet "***may have been motivated by race***."
- Office of Labor Relations decided to not take action on Hall-Thiam's report and conducted an independent investigation. Second investigation found Romans guilty of "discriminatory harassment of coworkers" and "threatening workplace violence," resulting in his termination.
- Sixth Circuit affirmed MSJ. No causal connection between Hall-Thiam's racial comment/report and termination. Ultimate ***decision maker conducted independent investigation*** and did not rely on allegedly discriminatory report.

Theus v. GlaxoSmithKline, 452 Fed. Appx. 596 (6th Cir. 2011).

- Rhonda Theus moonlighted as ***purveyor of adult materials*** (nude photos, live video broadcast); her female co-workers found out and relationships deteriorated at work.
- Theus claimed co-workers were harassing her ("bitch, whore, slut"); co-workers claimed she was threatening them. HRA manager interviewed eleven witnesses; terminated Theus for threatening to, "***go to my car and get my pistol and blow their ass away***." Her suit for sexual harassment and retaliation dismissed on MSJ. Sixth Circuit affirmed.
- Her complaints of co-worker harassment not based on gender; she only alleged supervisor harassment *after* termination, and honest belief rule prevented pretext argument.

Retaliation

Algie v. N. Ky. Univ., 456 Fed. Appx. 415 (6th Cir. 2012)

- Algie, a "serial plaintiff," filed ***multiple charges/lawsuits***; while second charge was pending and four months after dismissal of first suit, NKU fired him for "***resume fraud, insubordination***, constant ***monitoring of co-workers***, and certain safety concerns."
- Algie sued under Title VII for retaliation. The ***temporal proximity*** alone held ***sufficient*** to establish ***causal connection*** element of *prima facie* case.
- Sixth Circuit affirmed MSJ. Algie was unable to establish pretext; he had lied on his application; repeatedly criticized the "character and qualifications of supervisors," and prior criminal charges justified the safety concerns.

Krumheuer v. GAB Robins N. Am., Inc., 2012 U.S. App. LEXIS 9999 (6th Cir. 2012)

- Krumheuer was selected for layoff for poor attendance, documented performance issues and written warnings.
- Prior to layoff, he experienced symptoms of ***heart attack***, was diagnosed with ***coronary heart disease***, requested leave for surgery, leave was granted but delayed, was shortly thereafter terminated in RIF.
- He brought FMLA ***interference*** (which he abandoned) and ***retaliation*** action. Sixth Circuit affirmed MSJ. Close ***temporary proximity*** was ***sufficient*** alone to establish ***causal connection*** for *prima facie* case. ***But*** GAB articulated legitimate reasons for selection in RIF - poor attendance/performance – and he failed to establish pretext.

Kean v. IT-Works, Inc., 2012 U.S. App. LEXIS 4918 (6th Cir. 2012)

- Kean, a female therapist, complained of sexual harassment by male co-worker; IT-Works took effective remedial action stopping the harassment.
- ***2½ months later***, Kean was ***terminated for gossiping*** about the owner's poor financial condition.
- Sixth Circuit affirmed MSJ, dismissing hostile environment and retaliation claims. The ***proximity in time (2½ months)*** alone, without more, was ***insufficient*** to establish a causal connection.
- "Intervening favorable actions of an employer may not be a complete bar to recovery, but they assuredly weigh against a claim of retaliation."

Age Discrimination

Segel v. Kimberly-Clark Corp., No. 10-2223, 2012 U.S. App. LEXIS 6500 (6th Cir. Mar. 28, 2012).

- Disagreeable Garry Segel, 53 year old salesman, was fired by KCC for "lack of flexibility," documented in performance appraisals, customer complaints, 90-day Performance Improvement Plan, and 30-day Last Chance Agreement.
- Segel, relying on *White v. Baxter Healthcare Corp.* argued that "flexibility" is highly subjective requiring jury to decide.
- Sixth Circuit affirmed MSJ, distinguished *White*, and held "inflexible," although subjective, was "adequate where it was repeatedly utilized by varying people on numerous occasions."

Lefevers v. GAF Fiberglass Corp., 667 F.3d 721 (6th Cir. 2012)

- Lefevers, age 58, laid off in RIF, claimed multiple "age-conscious statements" were direct evidence of pretext.
- E.g. "old Bob Dole," "When are you going to retire,?" and, "There are some elderly supervisors that we have to do something with within the next year."
- Sixth Circuit affirmed MSJ. Statements not direct evidence and the "elderly supervisor's" statement was two years old.
- Documented poor performance in last performance appraisal not shown to be pretextual.

Tennessee Update

Gates v. Metro. Gov't of Nashville, 2012 U.S. Dist. LEXIS 87533 (M.D. June 25, 2012)

- Janette Gates complained to THRC re: gender discrimination by Nancy Tice (who was sleeping with Election Commission Chair, Greer).
- Greer ordered Gates to dismiss her charge; when she refused, he ordered EC Director Tieche to terminate her.
- D. Ct. held "to be held liable as an aider and abettor under THRA" an individual must "***discourage his employer from taking remedial action***."
- MSJ granted for Tieche but denied for Greer who influenced EC management to not discipline his girlfriend and to fire Gates.